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In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 1519

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MICHAEL J. EYEN,

Petitioner.

vs.

STATE OF NEBRASKA, el rel
CLARENCE A. H. MEYER, Attorney General,

Respondent.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

o——o——o

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PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska entered in the above entitled case on January 26, 1970.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, entered on January 26, 1970, is printed in Appendix "A" hereto, infra pp. ––– and is reported in 184 Neb. 848; ––– N.W. 2d –––.

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on January 26, 1970, and is printed in Appendix "A", page –––. The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254.

QUESTIONS PRESENTED

1. Is a defendant's constitutional guarantee of equal protection of the laws violated where he is not treated like others under like circumstances and conditions both in the privilege conferred and the liabilities imposed?

2. Is a defendant's right to "due process" under Article V of the Constitution of the United States violated at an administrative hearing involving revocation of a license to practice dentistry, because of imprisonment?

3. Is the permanent revocation of a license of a dentist who entered a plea of nolo contendere to a felony an excessive penalty in violation of Article VIII of the Constitution of the United States of America.

STATEMENT

Petitioner Michael J. Eyen is a doctor of dental surgery licensed to practice in the State of Nebraska. He is a graduate of the University of Nebraska and was issued his license number 2536 of the State of Nebraska on July 3, 1940. After graduation the petitioner entered into the Military Service of the United States and remained there until the year 1951, at

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which time he entered into the private practice of dentistry in Lincoln, Nebraska.

From March, 1951 to March 30th, 1962, the petitioner's career was unblemished and he was highly respected in the community, both in his professional capacity and as a citizen. On March 31, 1962, the petitioner was arrested by the Lincoln Police and charged with "assault with intent to inflict great bodily harm," a crime purportedly committed by petitioner on March 17, 1962.

On April 2, 1962, the appellant appeared in the County Court of Lancaster County with Counsel, now deceased, entered a plea of "not guilty," and was bound over to the District Court of Lancaster County. On May 17, 1962, appellant appeared in the District Court of Lancaster County, upon the insistence and advice of Counsel, and pleaded nolo contendere. The Court found the petitioner guilty, but deferred sentence until May 24, 1962, when petitioner was sentenced to four years in the state penal complex. Petitioner was released on May 24, 1964.

During petitioner's confinement in the state penal complex the State of Nebraska, ex rel Attorney General Clarence A. H. Meyer, filed a Petition with the Director of Health of the State of Nebraska, the object and prayer of which was to revoke the petitioner's license to practice dentistry. A copy of the Petition was served upon the petitioner in the state penal complex. He was not permitted to attend a hearing held on June 15, 1962. At this time evidence was adduced by the State of Nebraska. After the introduction of the State's evidence, this petitioner's attorney then moved that further hearing be continued until a later date. The Director of Health of the State of Nebraska, who was the hearing officer, then entered an order that the hearing be continued to a later date to be determined by him, but in no

event should that date be extended beyond the date upon which the defendant would or could be released from incarceration in the State penal complex.

On the 9th day of August, 1962, a notice of hearing was sent to this petitioner advising him that a hearing date had been set on the 30th day of August, 1962, at the hour of 9:00 a.m. On that date, August 30, 1962, in the absence of the petitioner, Doctor E. A. Rogers, the then Director of Health of the State of Nebraska, revoked the petitioner's license to practice dentistry in the State of Nebraska. The petitioner was not permitted by the State to be present at this hearing.

The Federal Constitutional question of due process and excessive penalty was in the first instance raised in the District Court hearing by oral motion, which was denied by the District Court.

REASONS FOR GRANTING THE WRIT

The Statutory provisions of the State of Nebraska RRS 71-147 provide for the revocation or suspension of a license to practice a profession under certain conditions. The portion of the statute having relevancy in the case before this Court reads as follows:

> "A license to practice a profession *may* be revoked or suspended when the licensee is guilty of any of the following acts or offenses * * * for conviction of a felony."

In *Mathews v. Hedlund,* 82 Neb. 830, the Supreme Court of Nebraska has held:

> "Once the licensing authority has issued a license the right thereunder to practice medicine is a valuable right and one that may not be taken away without good cause; if such

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> license is cancelled by the Director of Public Health it must be upon proper charges with opportunity to appear and defend by the introduction of evidence and cross-examination of those witnesses who testify against the physician at the hearing."

The facts here clearly show that the respondent was denied substantive due process guaranteed by Article V of the Amendments to the Constitution of the United States, when petitioner was not permitted to attend the hearings in which his license to practice dentistry was revoked.

The object of the Constitutional Guarantee of due process of law, which includes the substantive due process, is to preserve personal and property rights against the arbitrary acts of public officials and applies to administrative as well official proceedings, 42 Am. Jur. Public Administrative Law, Section 116.

The Supreme Court of the State of Nebraska in *Norris v. Lincoln*, 93 Neb. 658, 142 N.W. 114, held that the Constitutional guarantee of equal protection of the law requires that all persons shall be treated alike under like circumstances and conditions both in the privilege conferred and the liabilities imposed. This Court has held in *Hirabayashi v. United States*, 320 U.S. 81, "that although the Fifth Amendment contains no equal protection clause and restrains only such discriminatory legislation as amounts to a denial of due process, due process of law has been defined to mean a general and public law operating equally on all persons in like circumstances and not a particular or private law affecting the rights of a particular individual or class of individuals in a way in which the same rights of other persons are not affected." Due process of law is denied if any particular person of a class or the community is singled out for the imposition of restraint or burdens not imposed upon and to

be borne by all in the class. In the instant case, this petitioner was singled out for the imposition of restraining him from the practice of dentistry. This petitioner introduced into evidence several cases in which licensees in the medical arts had been found guilty of a felony by the State of Nebraska. However, the State of Nebraska, by and through its Director of Health, did not take any administrative action to revoke the respective licensees. These cases introduced into evidence by the petitioner were recent cases all having occurred under the same Public Health Director. It would thus appear that the act of the Director of Health in revoking petitioner's license to practice dentistry was arbitrary in its nature and unequivocally the denial of the equal protection of the law to this petitioner.

Article VIII of the Amendments of the Constitution of the United States states:

> "Excessive bail should not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted."

To deprive an individual from the earning of a livelihood in the field that he has chosen, constitutes cruel and unusual punishment. In *Yakov v. Board of Medical Examiners*, 435 Pac. 2d 553, the Supreme Court of California stated: "that the purpose of seeking revocation of a doctor's certificate or license is not to punish the doctor but rather to protect the public. Professional licensing provisions are not fundamentally for the punishment of the licensee but solely for public protection. The contrary could result in dual punishment for a single crime."

In the instant case there was no evidence establishing that the doctor was incompetent nor that the public was endangered by permitting him to practice dentistry. Petitioner contends that permanent revocation of his license constitutes punishment rather than protection of the public and such permanent

revocation constitutes cruel and unusual punishment in this particular instance.

The Supreme Court of Nebraska stated in *Wilbur v. Reed*, 84 Neb. 767, 122 N.W. 53, that due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon questions involving life, liberty or property, to be heard and to have the right to controvert the position of the accuser. This right was denied this appellant. By appellant's being incarcerated in the State penal complex, he was not permitted to be present before the tribunal which revoked his license to practice.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX "A"

NEBRASKA SUPREME COURT
State ex rel. Clarence A. H. Meyer, Attorney General,
Appellee, v. Michael J. Eyen, Appellant.
– N. W. 2d –
Filed December 5, 1969. No. 37285.

1. *Licenses and Permits: Appeal and Error.* An order of revocation of a license to practice a profession will not ordinarily be disturbed in the absence of an abuse of discretion.
2. *Licenses and Permits: Administrative Law.* The conviction of a felony cannot be collaterally attacked in a proceeding before the Director of Health for revocation of a license to practice a profession.

Appeal from the district court for Lancaster County: William C. Hastings, Judge. Affirmed.

Shrout, Linquist, Caporale, Brodkey & Nestle, for appellant.

Clarence A. H. Meyer, Attorney General, and Bernard L. Packett, for appellee.

Heard before White, C. J., Carter, Spencer, Boslaugh, Smith, McCowan, and Newton, JJ.

Spencer, J.

This action for the revocation of the license of defendant, Michael J. Eyen, to practice dentistry in Nebraska originated before the Director of the Department of Health of the State of Nebraska. On appeal, the district court found the evidence

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sufficient to sustain the order of revocation of the Director of Health.

In accordance with Rule 8 a 2 (3), Revised Rules of the Supreme Court, 1967, we consider only the assignments of error specifically set out in defendant's brief. They are as follows: "I. The Court erred as follows: in sustaining the Order of Revocation, by the Director of Health of the State of Nebraska, of License No. 2536 to practice Dentistry.

"II. The Court erred in not admitting into evidence Exhibits 9, 10 and 11.

"III. The Court erred in not admitting the testimony of Josephine Eyen and that of Anne Eyen."

Defendant pled nolo contendere to an information charging the felony offense of assault with intent to inflict great bodily harm. The offense involved the throwing of acid on the victim. On May 24, 1962, defendant was sentenced to confinement in the Nebraska State Penitentiary for a period of 4 years. On May 29, 1962, the present action for revocation was filed before the Director of Health. Defendant was served with notice at the penitentiary. He did not personally appear at hearings held June 15, 1962, and August 30, 1962, but was represented by counsel. The order of revocation was entered September 5, 1962. The appeal to the district court was heard in November 1968.

Section 71-147, R. R. S. 1943, provides, so far as material herein: "A license to practice a profession may be revoked or suspended when the licensee is guilty of any of the following acts or offenses: * * * (2) immoral, unprofessional or dishonorable conduct; * * * (4) conviction of a felony; * * *."

The defendant does not challenge the jurisdiction of the Director of Health, nor does he contend that the evidence adduced was insufficient under the circumstances to sustain a revocation. He does, however, urge that the wording of the statute provides permissive rather than mandatory revocation or suspension, and that in his case revocation is too severe. We agree the use of the word "may" makes the statute permissive or discretionary in this instance, but we do not accept defendant's conclusion.

An order of revocation of a license to practice a profession will not ordinarily be disturbed in the absence of an abuse of discretion. There has been no abuse of discretion herein. Defendant was convicted of a serious criminal act. To hold that the order of revocation was an abuse of discretion would be to emasculate the statute.

Defendant attempts to impeach his conviction by now denying his guilt and by producing affidavits of an accomplice that he testified falsely in the criminal prosecution, and of the victim that he wished to retract the statement that there was any sexual relationship between him and the defendant. The accomplice at the time of the execution of the affidavit was a fellow inmate. These affidavits were properly excluded. It is not possible to reverse a criminal conviction in an administrative proceeding. The conviction of a felony cannot be collaterally attacked in a proceeding before the Director of Health for revocation of a license to practice a profession.

Defendant concedes that he understood the effect of a nolo contendere plea. To use his words: "I understood what a no contest charge would involve." He now contends that his attorney, who is deceased, assured him that the worst he would get was a "bench parole." Defendant's attorney was a very able and reputable lawyer, and it strains the bounds of credulity to

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believe that he would have given defendant such assurance in view of the nature of the case, but assuming it was so, it could have no effect herein. We are more inclined to believe that the reason for the nolo contendere plea is to be inferred from the affidavit of the victim, offered by the defendant and excluded by the trial court.

Assignment of error No. 3 refers to exclusion of certain testimony of defendant's mother and sister. The offer of proof is substantially that if they had been permitted to testify they would have said that immediately after the sentencing defendant's attorney said he was surprised, and that he thought it would be a "bench parole." This testimony was immaterial and was properly excluded.

The record on defendant's plea is in evidence. The following is pertinent: "MR. DOUGLAS: Has it been explained to you in the event you enter a plea of Guilty, Mr. Eyen, to the Information as charged, you will be admitting the facts contained therein and you will not be entitled to a trial by jury and it will merely be up to this Court to determine the disposition of this case; do you understand that? THE DEFENDANT: Yes. * * * MR. DOUGLAS: I would like to ask the defendant a few questions: Have there been any threats by anyone to have you enter this plea of Nolo Contendere? THE DEFENDANT: No, sir. MR. DOUGLAS: Have there been any promises by anyone in law enforcement to have you enter this plea of Nolo Contendere? THE DEFENDANT: No, sir. MR. DOUGLAS: Are you pleading Nolo Contendere after you have had an opportunity to discuss this matter with your attorney Mr. Devoe? THE DEFENDANT: Yes. MR. DOUGLAS: And are you pleading Nolo Contendere freely and voluntarily? THE DEFENDANT: Yes, sir."

Defendant's testimony on cross-examination herein is also

revealing. It is as follows: "Q. That isn't what I am asking. I am asking you if you understood that you could be sentenced to the Penitentiary if you were found guilty of this charge against you? A. Yes, I believe I understood that. Q. And there was certainly no guarantee you would get probation, is that true? A. No, there was no guarantee."

While defendant did not assign violation of due process as error herein, he does suggest that issue in his argument. In passing, we observe that he concedes he had personal notice of the revocation hearing and that he was represented by counsel at the hearing. He also concedes he was told arrangements could be made for his appearance at the hearing, but that he never got there.

We find no merit in any of defendant's assignments of error. The judgment is affirmed.

Affirmed.